private rights (including the right to compensation) or state powers (including the power of eminent domain). Protection of the home interest cannot always trump the power to expropriate private property for a public purpose, but when homes and communities are destroyed for a public purpose the expropriation should actually serve a real and serious public purpose, and when the public purpose relates to economic development the affected residents and community should benefit from it. Unless the residents who are evicted to facilitate economic development benefit from direct and secure access to new and better housing in the new development, both as individuals and as a community, it should be very hard, in all but the most exceptional cases of real and serious public necessity, to justify either the taking of individual property or the resulting eviction that destroys the community.

Chapter 5

The Displacement and Dispossession of Asylum Seekers: Recalibrating the Legal Perspective

James A. Sweeney and Lorna Fox O'Mahony[1]

(1) Introduction

Asylum seekers have been rightly described as 'among the most legally and socially disadvantaged people in western societies'.[2] Amongst immigrants, and as a product of their *forced* migration, asylum seekers are especially vulnerable to suffering from limited access to social housing. Immigration and social housing already sit on a precarious axis. Two recent contrasting media headlines on a 2009 report by the UK's Equality and Human Rights Commission illustrate this aptly.

The report, entitled *Social Housing Allocation and Immigrant Communities*, was designed specifically to look at the facts behind '[w]idespread media reports [which] suggest that migrants receive priority in the allocation of social housing, and in doing so displace non-migrants'.[3] The report found quite clearly that less than two per cent of all social housing residents are people who have moved to the UK in the last five years and that nine out of ten people who live in social housing were born in the UK.[4] Equipped with the report, Housing Minister John Healy attempted to counter claims that social housing favours immigrants at the expense of the indigenous population, stating that he 'wanted to "nail the myth" that certain groups were losing out in terms of housing allocation. [...] It is largely a problem of perception [...]. The report shows there is a belief, a wrong belief, that there is a bias in the system.' The BBC covered the report and the minister's comments under the headline, 'Housing "not favouring migrants"'.[5] Tabloid newspaper the

1 lorna.fox@durham.ac.uk/j.a.sweeney@durham.ac.uk.

2 S. Castles and A. Davidson, *Citizenship and Migration: Globalisation and the Politics of Belonging* (Macmillan, London 2000), 73.

3 Equality and Human Rights Commission, *Social Housing Allocation and Immigrant Communities* (EHRC, London 2009), vii.

4 Ibid, viii and 19.

5 BBC, 'Housing "Not Favouring Migrants"' (available at http://news.bbc.co.uk/1/hi/uk_politics/8137408.stm, accessed 18 February 2010).

Daily Mail took a rather different interpretation, carrying the headline 'One in ten state-subsidised homes goes to an immigrant family'.[6]

In this example one idea of home has been set up in opposition to another, and a tension created between protecting (and defending) the indigenous population's sense of home, on the one hand and making *home* – at both the state and housing levels – available to 'others' who may have been displaced and dispossessed from elsewhere on the other. Indeed, this has been regarded as a deliberate effect of the 'domopolitics' which constructs these images of 'them and us' in an effort: 'to contain citizenship, to uphold a certain statist conception of citizenship in the face of social forces that are tracing out other cultural and political possibilities [through]...the assertion of a right to settle as "illegal" and "dangerous".'[7]

This chapter draws upon the recent emergence of 'home' as a subject of legal analysis,[8] and particularly on the proposition that the occupied home is a distinct type of property, due to its central role in our lived experiences as humans,[9] to reconsider the relationships between 'housing' and 'home' for human rights. There are obvious but implicit synergies across the three conceptual fields of shelter, housing and home as they influence human rights laws and norms. As Kenna has recently noted: '[h]ousing addresses the basic need for human shelter, but also facilitates the essential human requirement for a home.'[10] This chapter seeks to make explicit those relationships in the context of asylum seekers, and considers

6 Steve Doughty, 'One in Ten State-subsidised Homes goes to an Immigrant Family' *Daily Mail* (London 9 July 2009; available at http://www.dailymail.co.uk/news/article-1198016/One-state-subsidised-homes-goes-immigrant-family.html?ITO=1490, accessed 18 February 2010).

7 W. Walters, 'Secure Borders, Safe Haven, Domopolitics' (2004) 8 *Citizenship Studies* 237 at 256.

8 See, for example, L. Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, Oxford 2006); D.B. Barros, 'Home as a Legal Concept' (2006) 46 *Santa Clara Law Review* 255; M.J. Ballard, 'Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy' (2006) 56 *Syracuse Law Review* 277; A. Margalit, 'The Value of Home Ownership' (2006) 7 *Theoretical Inquiries in Law* 7; T. Inglesias, 'Our Pluralist Housing Ethics and the Struggle for Affordability' (2007) 42 *Wake Forest Law Review* 511; T.H. Wu, 'The Legal Representation of the Singaporean Home and the Influence of the Common Law' (2007) 37 *Hong Kong Law Journal* 81; A. Buyse, 'Strings Attached: the Concept of "Home" in the Case Law of the European Court of Human Rights' (2006) *European Human Rights Law Review* 294.

9 The legal concept of home has emerged our of cross-disciplinary and interdisciplinary 'home' scholarship, building on empirical studies and theoretical analyses of the lived experience of home, the meanings which home represents for occupiers, and the experience of losing one's home; see generally L. Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, Oxford 2006) n. 9, especially ch. 4.

10 P. Kenna, 'Globalization and Housing Rights' (2008) 15 *Indiana Journal of Global Legal Studies* 397.

how a clearer articulation of this triad could usefully inform legal analysis and policy debates concerning asylum seekers and failed asylum seekers.

Displaced from their state of origin, and easily displaced again from their precarious claim to housing in the UK, the 'double displacement' of asylum seekers highlights how law and policy effectively coerces behaviour through the promise or denial of housing with little reference to human rights or notions of 'home'. In exploring 'double displacement', two key features characterise our approach, both of which are drawn from an emphasis on the displaced or dispossessed human person who is the subject of the discussion. Firstly, we argue that the dominating or hegemonic discourse of legal and policy approaches to asylum seekers[11] produces a minimalist 'shelter' approach to questions of housing and home for asylum seekers. This chapter seeks to consider how human rights approaches might create possibilities for developing new thinking on this subject from a person-centred and problem-solving perspective rooted in analysis of how the asylum seeker experiences the absence of 'adequate housing' and the absence of 'home'.[12]

Secondly, and consequent on this approach, the paper considers the relationships between home, housing and human rights within the broader panoply of international and European human rights law. The importance of viewing housing within the broader framework of human rights – as a 'gateway' right – was emphasised by the UN Committee on Economic, Social and Cultural Rights when it recognised that:

> the right to housing is integrally linked to other human rights and to the fundamental principles upon which the [International Covenant on Economic, Social and Cultural Rights] is premised. Thus 'the inherent dignity of the human person' from which the rights in the Covenant are said to derive requires that the term 'housing' be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources.[13]

The Committee also noted that: 'the indivisibility and interdependence of civil and political rights and economic, social and cultural rights [as] fundamental tenets of international human rights law...has been repeatedly reaffirmed, most recently at

11 For a more detailed discussion of the human experience of displacement and dispossession for asylum seekers, see L. Fox O'Mahony and J.A. Sweeney, 'The Exclusion of (Failed) Asylum Seekers from Housing and Home: Towards an Oppositional Discourse' (2010) *Journal of Law and Society* 285–314. .

12 For further discussion of this approach, see H. van der Horst, 'Living in a Reception Centre: the Search for Home in an Institutional Setting' (2004) 21 *Housing, Theory and Society* 36 at 37.

13 See UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 4', 'The Right to Adequate Housing (Art.11 (1))' (1991) UN Doc HRI/GEN/1/Rev.7.

the World Conference on Human Rights in 1993.'[14] For example, without a secure base in housing in which the person can be based, the realisation of civil and political rights – while perhaps theoretically available – is practically more difficult.

The chapter explores the importance of 'home' to being human and, in turn, to human rights laws, both when 'housing' is available, in relation to the location and quality of accommodation provided to asylum seekers, and in relation to policies and practices that limit access to such accommodation, so that no shelter is provided. With regard to the latter, three case studies are undertaken to demonstrate that home and human rights thinking are absent from policies which exclude asylum seekers and failed asylum seekers from any claim to home, housing or shelter: the situation of people with a (medical) need for 'care and attention', late-applying asylum seekers and failed asylum seekers themselves. We demonstrate that the policies embodied in the relevant UK statutes, while arguably 'compliant' with international obligations, inadequately address the home needs of asylum seekers and failed asylum seekers, who must rely on the activism of individual judges to ameliorate their situation. Yet, without a statutory framework and a broader legal discourse that recognises the importance of home to the human needs of asylum seekers, the extent to which judicial responses can temper the harsh consequences of exclusion from housing and home is necessarily limited. The final section of the chapter argues against a 'minimal compliance' approach to human rights as externally imposed international obligations, in favour of an approach that sees human rights norms as a platform on which to build domestic policy solutions.

(2) Home, Exile and Alienation: 'Double Displacement'

The central importance of themes of home, exile and alienation for the human experience has long been recognised in philosophical writing.[15] We all exist in a relationship with place, whether positive or negative, whether with a meaningful

14 UNGA Res 32/130 (16 December 1977) UN Doc A/Res/32/130 also asserted, in paragraph 1, that (a) All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights; (b) The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development, as recognized by the Proclamation of Teheran of 1968.

15 See, for example, D. Cooper, *The Measure of Things* (Oxford University Press, Oxford 2002) for a philosophical account of what it might mean to 'be at home in the world'. Levinas described the *home* as a precondition for existence, since: '[m]an abides in the world as having come from a private domain, from being at home with himself, to which at each moment he can retire'; E. Levinas, *Totality and Infinity* (Martinus Nijhoff, The Hague 1969) 152.

connection to *home*, or – without such connections – in a state of alienation resulting from displacement and/or dispossession from a home-place.[16] In *Being and Time*,[17] Heidegger's ontological argument was that people cannot 'be' without having some connection to a particular place:

> The way in which you are and I am, the manner in which we humans *are* on the earth, is *Buan*, dwelling. To be a human being means to be on the earth as a mortal. It means to dwell…man *is* insofar as he *dwells*.[18]

When man loses the ability to dwell – for example, the exile or asylum seeker, who is displaced from, and/or dispossessed of their dwelling place and so has lost their place in the world – and, further, is rendered unable to recover a home-place elsewhere, whether in the sense of a dwelling, or a sense of place in the new region or homeland, this constitutes a threat to his human being. In contrast to voluntary migration, 'exile' can be read as 'enforced displacement and dislocation':[19] in the case of refugees and asylum seekers, the significance of *home*, in the sense of both displacement and dispossession from one's home, and the need to establish a new home, is evident.[20] Blunt and Dowling have indicated that:

> Notions of home are central in these migrations. Movement may necessitate or be precipitated by a disruption to a sense of home, as people leave or in some cases flee one home for another. These international movements are also processes of establishing home, as senses of belonging and identity move over space and are created in new places.[21]

The problem, however, is that some asylum seekers are prevented from creating a new sense of belonging or identity in the new place. Casey has noted that: '[n]ot only may the former place be lost but a new place in which to settle may not be

16 M. Heidegger, 'Bauen, Wohnen, Denken' (1951) ['Building Dwelling Thinking'] and the 1951 lecture '…dichterisch wohnet der Mensch' ['…Poetically man dwells…'] in A. Hofstadter (trans.), *Poetry, Language, Thought* (Harper Colophon Books, New York 1971).

17 M. Heidegger, *Sein und Zeit* (1927); J. Macquarrie and E. Robinson (trans.), *Being and Time* (Blackwell Publishers Ltd, Oxford 1962).

18 M. Heidegger, 'Bauen, Wohnen, Denken' (1951) ['Building Dwelling Thinking'] in A. Hofstadter (trans.), *Poetry, Language, Thought* (Harper Colophon Books, New York 1971) n. 17, part I.

19 H.K. Bhabha, 'Preface' in H. Naficy (ed.) *Home, Exile, Homeland: Film, Media, and the Politics of Place* (Routledge, New York 1999), xii.

20 For a more detailed discussion of the human experience of displacement and dispossession for asylum seekers see L. Fox O'Mahony and J.A. Sweeney, 'The Exclusion of (Failed) Asylum Seekers from Housing and Home: Towards an Oppositional Discourse' (2010) *Journal of Law and Society* 285–314.

21 A. Blunt and R. Dowling, *Home* (Routledge, London 2006), 2.

found...[the exile faces] the risk of having no proper or lasting place, no place to be or remain.'[22] This is the essence of our notion of 'double displacement'.

Yet, the impact of double displacement is not reflected in the laws and policies which govern access to housing and home for asylum seekers in the UK. The following sections demonstrate how the 'double displacement' of asylum seekers is excluded from legal reasoning, whether in relation to legislative policies towards asylum seekers and failed asylum seekers, or in the judicial application of international human rights standards to their predicament. The purpose of this analysis is to highlight the disjuncture between human experiences of displacement and dispossession from home on the one hand, and the limitations of human rights law in formulating responses which value these experiences, on the other. Finally, we move on to consider alternative methods of framing 'human rights' which might allow greater scope for recognising and responding to the double displacement of asylum seekers.

(3) Asylum and Destitution in the UK

We now turn to an exploration of the very real predicament of asylum seekers, as the paradigm of double displacement: displaced from their home state and dispossessed from 'home in housing'. Rather than responding to the adverse human consequences of displacement and dispossession, successive policies pursued by the UK government have actually heightened asylum seekers' vulnerability and sense of dislocation by adding conditions to and restrictions upon their right to, and ability to, access and participate in the labour market and to obtain social housing.

Pervasive amongst these policies is the attempt to use denial of housing as a means of coercing certain behaviour from (failed) asylum seekers. From the outset the paradox embodied by these policies must be acknowledged: while these policies typically give very little weight to the human cost of asylum seekers' inability to re-establish 'home', it is the universally acknowledged human need for 'home', and the deleterious effects of denying access to a meaningful home experience, that underpins their power to coerce.[23]

The following sections sketch the legal context of asylum seekers' home experiences, and show some potential legal solutions to their predicament based on European and international human rights law. However, we note that since these current approaches are rooted in the fairly blunt tools of existing law, and depend to a large extent on the activism of judicial interpretation, the vision of

22 E.S. Casey, *Getting Bank into Place – Toward a Renewed Understanding of the Place-World* (Indiana University Press, Bloomington 1993), preface, xii.

23 See further L. Fox O'Mahony and J.A. Sweeney, 'The Exclusion of (Failed) Asylum Seekers from Housing and Home: Towards an Oppositional Discourse' (2010) *Journal of Law and Society* 285–314.

'home' that they reveal is, at best, an atrophied vision that does little to ameliorate the risk of double displacement.

(4) Sketching the Legal Context: Asylum Seekers' Diminishing Rights to Housing

The UN Refugee Convention specifies some economic, social and cultural rights for persons recognised as refugees. However, whilst the person is still an asylum seeker awaiting the determination of their claim to be a refugee, the rights derived from the Refugee Convention generally do not apply.[24] States may choose to assimilate welfare support and social housing for asylum seekers with the national population, to separate it entirely, or to hold asylum seekers in detention. The exclusion of asylum seekers from the Refugee Convention leaves them vulnerable to political trends at the domestic level, and may result in only the barest of provision. Furthermore, even where domestic policies entitle asylum seekers to receive some shelter from the state, it is clear that merely providing a roof overhead does not suffice to satisfy even the most basic housing needs to enable a person to function in society.

The provision of support to asylum seekers in the domestic law of the UK was described by the Joint Committee on Human Rights in 2007 as 'a confusing mess'.[25] We pick up the story in the 1990s when, in a policy trajectory spanning the transition from Conservative to Labour governments, the rights of asylum seekers to social security benefits were progressively extinguished. When combined with a general prohibition upon the right of asylum seekers to work, the vulnerability and exposure that this engendered was clear.[26] Yet, a striking feature of the policies outlined below is that they rest on the premise that it is legitimate (indeed 'normal')

24 See *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants and ex parte B* [1996] 4 All ER 385 (CA); [1997] 1 WLR 275, 292 (Simon Brown LJ noting that 'no obligation arises under Art 24 [Refugee Convention] until asylum seekers are recognized as refugees. [...] Not for one moment would I suggest that prior to that time their rights are remotely the same'); R. Cholewinksi, 'Enforced Destitution of Asylum Seekers in the UK' (1998) 10 *IJLR* 462, 477; R. Cholewinski, 'Economic and Social Rights of Refugees and Asylum Seekers in Europe' (2000) 14 *Georgetown Immigration Law Journal* 709, 711; C. Sawyer and P. Turpin, 'Neither Here Nor There: Temporary Admission to the UK' (2005) 17 *IJLR Law* 688.

25 Joint Committee on Human Rights, 'The Treatment of Asylum Seekers' HL (2006–2007) 81-I; HC (2006–2007) 60-I, 110.

26 After one year an asylum seeker may apply for permission to work (but not to become self-employed or to engage in a business or professional activity), and only then if they can demonstrate that they are not responsible for the delay: Immigration Rule 360. Immigration Rule 360A provides that any permission to work will expire when a claim is 'fully determined', thus excluding failed asylum seekers from working. In *Tekle v Secretary of State for the Home Department* [2009] 2 All ER 193 the High Court held that the one year

to base the extent to which asylum seekers should 'benefit' from social housing and other elements of the welfare state on political policy-making. The later stages of this chapter demonstrate the cost of failing to recognise the impact of these policies on asylum seekers' rights to housing and home as human rights.

In 1996 delegated legislation[27] attempted to remove the entitlement to social security benefits of asylum seekers who did not claim asylum at the point of entry into the UK. The role of judicial responses in ameliorating the plight of destitute asylum seekers was demonstrated when the Regulations were successfully challenged in *R v Secretary of State for Social Security Ex p. Joint Council for the Welfare of Immigrants*.[28] In the conclusion of his judgment, Neill LJ noted that the Asylum and Immigration Appeals Act 1993 had provided 'fuller rights' to asylum seekers than they had previously enjoyed, particularly in relation to appeals against negative decisions. However, the court went on to note that the Regulations would either render these fuller rights useless by encouraging potential refugees to leave the UK before concluding their appeals, or the Regulations must:

> necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it. So basic are the human rights here at issue that it cannot be necessary to resort to the European Convention on Human Rights to take note of their violation...[29]

In a powerful indictment of the impact of the regulations in practice, Neill LJ went on to claim that he:

> would hold it unlawful to alter the benefit regime so drastically as must inevitably not merely prejudice, but on occasion defeat, the statutory right of asylum seekers to claim refugee status...I for my part regard the Regulations now in force as so uncompromisingly draconian in effect that they must indeed be held ultra vires.[30]

In upholding the asylum seekers' challenge to the Regulations, Neill LJ recognised the adverse human consequences of destitution when he reasoned that:

> Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution. Primary legislation alone could in my judgment achieve that sorry state of affairs.[31]

period also applies where a hitherto failed asylum seeker presents a fresh claim for asylum (so on the expiry of a further year, they would be able to apply for permission to work).

27 Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996.

28 *R v Secretary of State for Social Security Ex p. Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.

29 Ibid., 292 (Neill LJ).

30 Ibid., 293 (Neill LJ).

Unfortunately this comment proved to be prophetic, and the 'sorry state of affairs' envisaged by Neill LJ was achieved when the Conservative government introduced, and Parliament passed, the Asylum and Immigration Act 1996 in order to more securely achieve the aims of the impugned Regulations.

Faced with destitution, asylum seekers began to assert rights under the residual safety net of the UK's welfare state provided by the National Assistance Act 1948.[32] In *R. v Hammersmith and Fulham London Borough Council, Ex parte M*[33] the Court of Appeal held that asylum seekers who were sleeping rough and going without food were covered by section 21(1)(a) of the NAA 1948, which imposes upon every local council a duty to provide residential accommodation 'for persons who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them'. One of the most significant elements of this development is that it transferred primary responsibility for housing those asylum seekers who qualified for NAA support on to local authorities. The incoming Labour government identified this issue in the White Paper *Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum*, which in turn informed the Immigration and Asylum Act 1999. Rather than reinstating asylum seekers' eligibility for mainstream social security benefits, the 1999 Act created an alternative to the residual NAA 1948 right to housing in the form of a separate national system of support for asylum seekers to be administered by a new National Asylum Support Service (NASS).

Under section 95 of the Immigration and Asylum Act 1999 the Secretary of State may provide support to asylum seekers 'who appear to the Secretary of State to be destitute or to be likely to become destitute'. In addition to accommodation, a single adult asylum seeker may receive £35.13 per week in cash. Different rates apply to parents and children.[34] Under section 4 of the same Act, the Secretary of State may also provide support to failed asylum seekers, as long as they cooperate with efforts to remove them from the UK.[35] If the failed asylum seeker does *not* comply with removal directions then, under section 54 IAA 1999 and Schedule

31 Ibid., 293 (Neill LJ).

32 The history of s. 21 NAA 1948 is summarised in *R. (on the application of M) v Slough BC* [2008] 1 WLR 1808 [7] (Baroness Hale), discussed further below.

33 *R. v Hammersmith and Fulham London Borough Council, Ex parte M* (1997) 30 HLR 10.

34 Asylum Support (Amendment) (No. 2) Regulations 2009; see http://www.bia.homeoffice.gov.uk/asylum/support/cashsupport/currentsupportamounts/ (accessed 8 January 2010).

35 The criteria are set out in Regulation 3 of the Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005.

3 NIAA 2002, they become ineligible either for NASS 'hard case' support or for local authority 'destitution plus' provision.[36] Under section 9 of the Asylum and Immigration (Treatment of Claimants) Act 2004, even failed asylum seekers with children may have their support removed in this way.

The section 4 scheme, known as 'hard case' support, is designed for failed asylum seekers who are unable to leave the UK immediately due to reasons beyond their control. Unlike section 95 support, this does not result in cash payments, but consists of accommodation plus £35 per week in vouchers. Significantly, the use of vouchers rather than cash may exacerbate the stigmatisation of failed asylum seekers and also limits their choice as to where they purchase goods to meet their essential needs.[37] Thus, the use of vouchers in this way compounds the lack of autonomy which renders accommodation for asylum seekers 'unhomely'. However, as we shall see below, the section 4 regime is hugely problematic, not least of all because it is estimated that only four per cent of failed asylum seekers in the UK are in receipt of it,[38] thus leaving the vast majority unsupported.

(5) The Location and Quality of Asylum Accommodation: Shelter, Housing and Home

Even where asylum seekers are able to secure shelter from the state, the adequacy of provision in supporting housing and home has been criticised. Two key issues have emerged in reports scrutinising the accommodation provided when an asylum seeker is eligible under the national system set out in section 95 of the Immigration and Asylum Act 1999: the location and the quality of the accommodation provided. The emergence of these issues underscores the state's perception of its role as providing 'shelter' rather than housing or home as they might be understood in the context of the 'right to housing' or the 'right to respect for home'. Indeed the approach of the UK to *sheltering* asylum seekers might deliberately undermine meanings of housing and home. For example the issue of location is rooted in the policy of dispersal, which has come under criticism from the UK's House of Commons Public Accounts Committee. The primary criterion in this process, which disperses asylum seekers around the UK, is the availability of accommodation, which the PAC has recognised 'can result in individuals becoming isolated.'[39] This reflects Diken's observation that refugee spaces (whether 'open' spaces, such

36 Schedule 3 also comprehensively excludes support under other non-asylum-seeker-specific welfare provisions.

37 Joint Committee on Human Rights, 'The Treatment of Asylum Seekers' HL (2006–2007) 81-I; HC (2006–2007) 60-I [110].

38 Independent Asylum Commission, Second Report of Conclusions and Recommendations, 'Safe Return' (Independent Asylum Commission, London 2008), 31.

39 Public Accounts Committee, 'Management of Asylum Applications' HC (2008–2009) 325, 6.

as accommodation centres or reception centres, or closed spaces e.g. detention centres) are often deliberately located 'outside cities, in suburbia or in rural areas, as a rule in demonstrably peripheral sites';[40] away from amenities and facilities, and 'characterised by a sterilised, mono-functional enclosure: contact with the outer world is physically minimised behind the fences, which yield no permission to touch the outer world resulting in the complete isolation of the refugee from public life.'[41]

The second, and perhaps more even more pressing issue is the quality of accommodation. The UK's Joint Committee on Human Rights argued in its 2007 report on 'The Treatment of Asylum Seekers' that in some cases the quality and terms of accommodation provided to asylum seekers is so woeful as to constitute a failure to respect home and family life under Article 8 ECHR and the right to adequate housing under Article 11 ICESCR,[42] discussed further below. Nevertheless, the government maintains that it 'has agreed standards and contracts' which ensure there is no breach of international obligations.[43]

Against this background, and the likelihood that the asylum seeker already, by virtue of their displacement from (and probably also dispossession in) their home state, is experiencing 'a sense of powerlessness and dependence...frequently mixed with an acute anxiety about their new circumstances and strong feelings of homelessness';[44] the impact of further displacement in respect of asylum seekers' precarious claim to housing (and by extension to re-establish *home*) is significant. Thus we are not just concerned with 'homelessness' in the sense of being without shelter, but with the argument that although asylum seekers may be provided with a roof over their heads, the evidence clearly indicates that the provision of shelter in this respect cannot necessarily be described as 'housing', and is not likely to be conducive to feelings of home.

The distinction between being without shelter and being homeless was recognised by the UN in its definition of homelessness as 'a condition of detachment from

40 B. Diken, 'From Refugee Camps to Gated Communities: Biopolitics and the End of the City' (2004) 8 *Citizenship Studies* 83, 91.

41 Ibid.

42 These comments related specifically to accommodation provided under s. 95 IAA 1999, discussed further below. See also Joint Committee on Human Rights, 'The Treatment of Asylum Seekers' HL (2006–2007) 81-I; HC (2006–2007) 60-I [104]; note that according to the High Court in *R (Baiai & another) v Secretary of State for the Home Department* [2006] EWHC Admin 823, in so far as JCHR reports express opinions on matters of law, they have only persuasive value; see generally J. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help Facilitate a Culture of Rights?' (2006) 4 *International Journal of Constitutional Law* 38.

43 Joint Committee on Human Rights, 'Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers', HL (2006–2007) 134; HC (2006–2007) 790 [9].

44 C. Kinnvall, 'Globalisation and Religious Nationalism: Self, Identity, and the Search for Ontological Security' (2004) 25 *Political Psychology* 741, 747.

society characterised by the lack of affiliative bonds…[that] carries implications of belonging nowhere rather than having nowhere to sleep.'[45] As 'non-citizens', exiles, refugees and asylum seekers are already marked out as not belonging, and as subject to explicit policies which seek to ensure that they are not enabled in developing a sense of belonging, or coming to feel 'at home'. The negative impacts of homelessness on individual well-being are well-established in research literature:

> Coping without a home is a stressful, time-consuming occupation. Every single day, homeless people are faced with the task of securing food, shelter, and other necessities of life. Frequently they are obliged to negotiate complex bureaucratic systems, endure alienating and dehumanising service-delivery routines, and risk arrest or jail. They live with the physical and psychological consequences of poor diet, inadequate rest, and lack of health care.[46]

The absence of home is also associated with alienation from the practical and psychological benefits (particularly in relation to ontological security and identity) that flow from having an opportunity to establish a home, for example, the potential to develop social, cultural or community capital in a particular location. While Bourdieu recognised the importance of durable networks for the acquisition of social capital,[47] Putnam linked social capital to effective democracy,[48] and for individual and community engagement in civil society.[49]

45 UNCHS/Habitat, *Strategies to Combat Homelessness* (UN Centre for Human Settlements, Nairobi 2000), xiii.

46 J. Wolch and M. Dear, *Malign Neglect: Homelessness in an American City* (Jossey-Bass Publishers, San Francisco 1993), 246; quoted in A. Blunt and R. Dowling, *Home* (Routledge, London 2006) 127.

47 Defined as: 'the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition' (P. Bourdieu, 'The Forms of Capital' in J Richardson (ed.) *Handbook of Theory and Research for the Sociology of Education* (Greenwood, New York 1986), 241–58; while sense of belonging and place attachment have not been central to the meta-theories of social capital, the role and relevance of place for social capital particularly amongst young people is emphasised by Schaefer-McDaniel, who argues that social capital must be grounded in the physical environment. See N.J. Schaefer-McDaniel, 'Conceptualizing Social Capital among Young People: Towards a New Theory' (2004) 14 *Children, Youth and Environments* 140 (available online at http://www.colorado.edu/journals/cye/14_1/articles/article6full.htm, accessed 17 September 2010); the role of the 'sense of belonging' in social capital is also noted in D. Narayan and M.F. Cassidy 'A Dimensional Approach to Measuring Social Capital: Development and Validation of a Social Capital Inventory' (2001) 49(2) *Current Sociology* 59–102.

48 See R.D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, Princeton 1993).

49 See R.D. Putnam, *Bowling Alone: America's Declining Social Capital* (John Hopkins University Press, Baltimore 1996).

Viewed from another perspective, the absence of housing and home can be viewed not merely as a material hardship but as the denial of opportunity, for example, to participate in civil society,[50] and – recognising housing as a gateway right – to realise civil and political rights. Considering the similarly marginalised position of the poor in a society, Haworth noted that:

> One is poor not because he has no money, but because, possibly owing to lack of money, he lacks also access to the social instrumentalities that make humanly significant action possible. In part, it is a simple matter of not having the price of admission…[51]

Furthermore, where the population who are excluded from such actions are not randomly distributed but belong to a particular group – for example, asylum seekers – this arguably raises a question about discriminatory infringement of civil and political rights.

Of course, to make such a claim legally enforceable, it would be necessary to establish a causal link between the exclusion from housing and home and the inability to exercise particular civil and political rights to which the asylum seeker is entitled, and we do not currently claim to be in a position to make that link explicit. It is, however, possible to begin to map out some of the steps. The need for displaced persons to re-establish some sense of home for their mental and physical wellbeing was emphasised in van der Horst's Dutch study of asylum seekers living in reception centres.[52] Van der Horst noted that, while policy discourse concerning accommodation for asylum seekers tends to focus on efficiency, functionality and the provision of shelter, when discussing their lives in the centre the residents used home discourses to describe their experiences, including their frustration at not having 'even the most basic attributes of home'.[53] Yet, she argued, this perspective 'is hardly represented in the dominant discourse.'[54]

> Talk about the right to a home is very marginal when the people involved are not legal residents, as is the case with asylum seekers. The centres are hardly aimed at providing a home. The concern is with giving a shelter and making the procedure run smoothly. Functionality within the aims of the

50 See for example, F. Michelman, 'On Protecting the Poor through the Fourteenth Amendment' (1959–70) 83 *Harvard Law Review* 7.

51 Haworth, 'Deprivation and the Good City' in W. Bloomberg and H. Schmandt (eds), *Power, Poverty, and Urban Policy* (Sage, Beverly Hills 1968), 27.

52 H. van der Horst, 'Living in a Reception Centre: the Search for Home in an Institutional Setting' (2004) 21 *Housing, Theory and Society* 36.

53 Ibid.

54 Ibid.

> asylum procedure is top priority...it is a discourse of temporality, insecurity and authority...[55]

The home meanings most often missed by the residents of the reception centre in van der Horst's case study were autonomy (for example, the ability to choose what you eat and to prepare it) and the possibility to live your life in accordance with your cultural customs.[56]

It would therefore appear that there is a strong conceptual basis for arguing that 'housing as home' considerations – that is, considerations that go beyond concern with mere shelter – should be better represented in legal and policy discourse on housing for asylum seekers. Yet, as the following sections will demonstrate, there remain considerable challenges to the development of legal strategies that can effectively represent the asylum seeker's interest in securing accommodation which can function as a home, against the state's expressed interest in avoiding the establishment of home attachments in the UK during the asylum process. These are brought to the fore in three case studies in which the (failed) asylum seeker's limited rights to housing and home are challenged. Without mainstream acceptance of the importance of 'home' in legal and political discourse generally, or immigration and asylum law in particular, the extent to which asylum seekers in the UK 'enjoy' access to meaningful home has depended upon the judicial interpretation of domestic legislation that only indirectly addresses the idea of 'home'.

(6) Case Study 1: Asylum Seekers in Need of 'Care and Attention'

To coincide with the introduction of the national system of support for asylum seekers, section 116 of the Immigration and Asylum Act 1999 attempted to remove their access to local authority support under section 21(1)(a) NAA 1948 by inserting a new section 21(1A). The new section 21(1A) NAA 1948 excludes the provision of section 21(1)(a) support to persons subject to immigration control where their need for care and attention arises 'solely' because of destitution or the physical effects of destitution upon them. It was judicial activism, once again, which sought to ameliorate the impact of the legislation when in *R. v Wandsworth London Borough Council, Ex parte O* and *R. v Leicester City Council, Ex parte Bhikha*,[57] the Court of Appeal dampened the effect of the new section 21(1A) by indicating that virtually any infirmity would mean that the need for care and attention was not 'solely' because of destitution. In an evocative passage, Simon Brown LJ said, 'If

55 Ibid., 41.

56 Residents mentioned, for example, the absence of men and women's spaces, and cultural norms on suitable relations between family members.

57 *R. v Wandsworth London Borough Council, Ex parte O* and *R. v Leicester City Council, Ex parte Bhikha* [2000] 1 WLR 2539.

there are to be immigrant beggars on our streets, then let them at least not be old, ill or disabled.'[58] Significantly, even failed asylum seekers may continue to benefit from section 21(1)(a) support under this line of cases.[59]

In her judgment in *R. (on the application of M) v Slough Borough Council*, discussed below, Baroness Hale revealed that, following the *Wandsworth* case, it had been expected by the senior judiciary that only those asylum seekers with the sort of care needs which could only be met in specialised accommodation, and people who fell outside the asylum scheme altogether, would continue to fall under section 21(1)(a) NAA 1948 and thus be supported by local authorities, with others supported through the national system.[60] But, highlighting again the tensions which have been evident between the judiciary – who are routinely faced with the human and personal stories of the people who are seeking housing through this route – and national policy-makers, she added, '[T]his was wrong. The Secretary of State was determined that the national scheme would indeed be a last resort.'[61] If support was available from the local authority, then it would not be provided through the national system, even where the mere provision of accommodation could have met the asylum seeker's further needs arising from infirmity.

This has created difficulties where particular local authorities, in places like Slough in the south-east of England, have come under pressure to provide support to (failed) asylum seekers in need of care and attention. At a political level, it is perhaps understandable that the local authorities resent footing the bill for asylum seekers since matters relating to immigration are quintessentially national government issues. However, the consequence has been a series of cases where local and national government have been in dispute as to who is responsible for providing accommodation support for particular asylum seekers,[62] giving rise to what Sweeney has described as: 'an inverted and unseemly turf war between local and central government.'[63]

In the recent *Slough*[64] case the House of Lords, citing Sweeney, has shifted some of the responsibility back on to national government by narrowing the scope of eligibility under the National Assistance Act 1948. In *Slough* the House of Lords examined the predicament of 'M', an HIV-positive Zimbabwean 'overstayer' (i.e. someone who had stayed beyond the amount of time permitted on their visa). His

58 Ibid., 2548.

59 See J.A. Sweeney, 'The Human Rights of Failed Asylum Seekers in the UK' (2008) *PL* 277 and C. Lewis 'Asylum Support Brief – Part Three: Failed Asylum Seekers' (2006) 156 *NLJ* 1246.

60 *R. (on the application of M) v Slough BC* [2008] 1 WLR 1808 [27].

61 Ibid.

62 Discussed in C. Sawyer and P. Turpin, 'Neither Here Nor There: Temporary Admission to the UK' (2005) 17 *IJLR Law* 710.

63 J.A. Sweeney, 'The Human Rights of Failed Asylum Seekers in the UK' (2008) *PL* 277 and C. Lewis 'Asylum Support Brief – Part Three: Failed Asylum Seekers' (2006) 156 *NLJ* 285.

64 *R. (on the application of M) v Slough BC* [2008] 1 WLR 1808.

immediate need was for medication and a refrigerator in which to keep it. The House of Lords put forward a narrower reading of section 21(1)(a) NAA 1948 with the effect of upholding the local authority's decision to refuse accommodation. The court held that the 'need for care and attention' required to trigger the duty to provide residential accommodation must mean something more than a mere need for 'accommodation': the ordinary meaning of 'care and attention' was 'looking after',[65] and as M did not need 'looking after',[66] he therefore did not have a need of care and attention.

In *Slough* the House of Lords thus cut back on the eligibility of asylum seekers to local authority housing, suggesting that, henceforth, 'destitution plus' cases – in which the local government obligation to provide residential accommodation under the NAA will apply – will be limited to those persons whose need does not arise solely from destitution but who also, in some sense, need 'looking after'. The immediate effect of the *Slough* judgment is that local authorities are now within their rights to re-examine the circumstances of the persons to whom they are providing accommodation under section 21(1)(a) and to cease support for those who do not meet the stricter conditions set out in the *Slough* case. In theory, asylum seekers now have, in its place, extant rights to support under the national system administered by NASS. The reality, however, is that these people will likely face administrative delays, complex application processes, and, ultimately, barriers in accessing housing which is capable of functioning as *home*.

The House of Lords in *Slough* was silent on the potentially very serious implications of the judgment for 'M' himself, but in the introduction to her leading judgment Baroness Hale noted that since he had now made an application to remain in the UK on the ground that he feared breaches of his Article 3 ECHR rights on being returned to Zimbabwe, he would be entitled henceforth to NASS accommodation irrespective of the outcome of the case (at least for the duration of that application). The wider impact of the judgment is that by restricting access to local authority support under the NAA 1948 to people who need 'looking after', the House of Lords rendered *more* people eligible for national support by NASS. Thus the judgment put an end to the surprisingly restrictive approach to gaining access to accommodation theoretically provided at a national level. However, the judgment of the House of Lords, necessarily pinned to the facts and the legislation before it, could not address the central concern of this chapter: the importance of 'home' as central element of 'being human' and, thus, of human rights law. Indeed this case study is marked instead by its concern with the allocation of financial responsibility between branches of government and its immunity to concerns about the particular vulnerability of asylum seekers, and others subject to immigration control, to double displacement.

65 Ibid. [33] (Baroness Hale).

66 As Baroness Hale put it, M did not need looking after as, '[P]eople with the virus can now live normal lives for many years.' Ibid. [36] (Baroness Hale).

(7) Case Study 2: Late-applying Asylum Seekers

In 2002 primary legislation was passed that attempted to exclude late-applying asylum seekers from NASS accommodation and support. Section 55(1) of the Nationality, Immigration and Asylum Act 2002 (NIAA) places the Home Secretary under a duty to exclude asylum seekers who do not make their application for asylum 'as soon as reasonably practicable'. However, a 'safety net' under section 55(5) NIAA 2002 does 'not prevent' the Home Secretary exercising a power to support late-applying asylum seekers to the extent necessary for the purpose of avoiding a breach of the European Convention on Human Rights, so preventing the Act from requiring the Home Secretary to act in such a way as to conflict with section 6(1) of the Human Rights Act (HRA) 1998.[67] Yet, in what appears to be a spirit of minimal compliance, the Home Secretary has seemed at times reluctant to exercise this power, even in the face of considerable hardship.

An example of the judiciary forcing the use of the safety net can be seen in the case of *Adam, Limbuela and Tesema*,[68] where each applicant had been excluded from access to support by virtue of section 55(1), and the power under section 55(5) had not been exercised by the Home Secretary. The facts presented to the House of Lords indicated that the applicants had each experienced real hardship, including sleeping rough, and the House of Lords went on to hold that the Home Secretary's failure to exercise the power under section 55(5) NIAA 2002 amounted to a violation of their right to freedom from inhuman and degrading treatment under Article 3 ECHR. The House of Lords found that because the statutory framework combined the exclusion from support and accommodation with a prohibition on work, it was a positive act by the state against asylum seekers.[69] It was therefore caught by Article 3's prohibition upon inflicting inhuman and degrading treatment, rather than a positive obligation to protect the applicants from experiencing inhuman and degrading conditions.

It is significant to note that this case was adjudicated on the basis of Article 3 ECHR, which at one level provides a welcome recognition that homelessness and destitution strike at the heart of what it means to be human: that they can constitute inhuman and degrading treatment. However, it might seem counterintuitive to base any 'home' rights available to asylum seekers on Article 3 rather than the right to respect for home, family and private life in Article 8 ECHR. As well as reserving protection only to those cases with the most extreme adverse facts, as the discussion below will demonstrate, this can also be viewed as an acknowledgement of the particularly contingent nature of the right to respect for home under Article

67 s. 6(1) HRA 1998 renders it unlawful for a public authority to act in a way that is incompatible with a Convention right.

68 *R. v Secretary of State for the Home Department ex parte Adam, Limbuela and Tesema* [2005] UKHL 66; [2006] 1 AC 396.

69 Ibid. [7] (Lord Bingham); [56] (Lord Hope); [77] (Baroness Hale).

8 ECHR as well as the right to adequate housing in the International Convention on Economic, Social and Cultural Rights.

(8) Case Study 3: 'Failed' Asylum Seekers

At the end of the asylum process, a failed asylum seeker may be 'removed' from the UK. However, it is recognised that making a successful forced removal is challenging. Indeed a 2009 report of the UK Public Accounts Committee on this issue has observed that since its previous report removals of failed asylum seekers have actually decreased.[70] Therefore, in returning failed asylum seekers to their state of origin, much depends on their willingness to make a 'voluntary' departure from the UK.

Restricting entitlements to social assistance including housing is one means of encouraging failed asylum seekers' voluntary departure, although some refugee groups, for example, the European Council on Refugees and Exiles, have argued that departure from the UK in these circumstances should not be described as 'voluntary' at all. Where consent to return has been coerced, it is argued, it cannot be said that the person has 'freely chosen' to return so that this practice should be classified as 'mandatory return'.[71] Colm O'Cinneide has observed in this regard that it is 'highly questionable' to justify state inflicted destitution based on failed asylum seekers' choice because, 'this ignores the complex reality of their situation and permits the state to deny any responsibility to protect an extremely vulnerable and dependent group against destitution'.[72]

In the case of *Adam, Limbuela and Tesema*, discussed above, the Article 3 claim was successful because the House of Lords accepted that the government was 'directly responsible' for the destitution of the applicants. However, applying this logic to the experiences of failed asylum seekers who are not in receipt of section 4 'hard case' support is particularly problematic because the courts have generally taken the approach that where *failed* asylum seekers become destitute then it is their own fault since, unlike asylum seekers with pending applications or extant rights of appeal, there is nothing to prevent them leaving the UK; consequently, the state is not 'directly responsible'. We shall return to authority for this disappointing orthodoxy shortly.

70 Public Accounts Committee, 'Management of Asylum Applications' HC (2008–2009) 325, 6.

71 See ECRE, *The Return of Asylum Seekers whose Applications have been Rejected in Europe* (ECRE 2005; available at http://www.ecre.org/files/return.pdf, accessed 17 September 2010).

72 C. O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights (2008) *European Human Rights Law Review* 583, 604.

There are, however, a number of possible arguments that might be raised against the orthodoxy. For example, Sweeney has argued that the causal link between the statutory framework and the destitution of failed asylum seekers is not broken by their refusal to leave the UK: rather, he argued, the government remains 'directly responsible', so that Article 3 ECHR is engaged, and the power under paragraph 3, Schedule 3 NIAA 2002 should be exercised in favour of destitute failed asylum seekers.[73] This argument was based on the observation that the successful applicants in *Adam, Limbuela and Tesema* had 'chosen' not to apply for asylum as soon as reasonably practicable, and so the 'choice' exercised by failed asylum seekers should not be regarded as a complete barrier to the engagement of the state's direct responsibility.[74]

It is also arguable that human rights law imposes some duties on the state to protect individuals from their unwise or illogical choices. For example in *Uçar v Turkey*[75] the European Court of Human Rights articulated the protective duty owed to a suicidal or self-harming detainee under Article 2 ECHR. The court held that if the state was aware that a detainee posed a 'real and immediate risk' of suicide, it would be under a positive obligation to do all that could reasonably be expected to prevent that risk from materialising.[76] The detainee's apparent 'choice' to inflict harm upon their own person does not displace the state's responsibility to attempt to prevent the harm.[77]

A further set of arguments that might be made relates to the weakness of the section 4 scheme, described by the Joint Committee on Human Rights as 'inhumane and inefficient', and the government's acquiescence to the fact of mass homelessness amongst failed asylum seekers. As noted above, the Independent Asylum Commission found that in 2007 less than four per cent of failed asylum seekers who were still in the UK received support under the section 4 scheme (9,365 out of 283,500 people).[78] Thus it would seem indisputable that the legislative framework leaves large numbers of people destitute, and that the government must be aware of this. Furthermore, the European Court of Human Rights judgment in *Chahal v UK*,[79] recently reaffirmed in *Saadi v Italy*, makes it clear that suffering of the type covered by Article 3 ECHR can never be justified on wider policy grounds, as 'the prohibition of torture and of inhuman or degrading treatment or

73 J.A. Sweeney, 'The Human Rights of Failed Asylum Seekers in the UK' (2008) *PL* 277 and C. Lewis 'Asylum Support Brief – Part Three: Failed Asylum Seekers' (2006) 156 *NLJ* 1246, 294.

74 Ibid.

75 *Uçar v Turkey* [2006] ECHR 390.

76 Ibid. [86]. The European Court found that in this case the Respondent State had in fact fulfilled its duty.

77 Ibid. [83] *et seq*; *Akdoğdu v Turkey* [2005] ECHR 932 [44] (only available in French); *Tanribilir v Turkey* [2000] ECHR 612 [70–1] (also only available in French).

78 Independent Asylum Commission, Second Report of Conclusions and Recommendations, 'Safe Return' (Independent Asylum Commission, London 2008), 31.

79 *Chahal v UK* (1997) 23 EHRR 413.

punishment is absolute, irrespective of the victim's conduct'.[80] In the light of this principle, it is reasonable to assert that if the statutory framework leads to the fact of mass destitution amongst failed asylum seekers, the observation that such destitution may pursue the policy of deterring unmeritorious applicants from ever seeking to come to the UK is irrelevant.

The UK government has strongly refuted[81] the JCHR's finding that the government 'has indeed been practising a deliberate policy of destitution' of asylum seekers and failed asylum seekers.[82] However, in apparent contradiction of this the Court of Appeal has recently stated that the objective of the exclusions contained in Schedule 3 of the NIAA 2002 can be 'readily inferred' from its content:

> It is to discourage from coming to, remaining in and consuming the resources of the United Kingdom certain classes of person who can reasonably be expected to look to other countries for their livelihood.[83]

The 'discouraging' effect of Schedule 3 is rooted in the threat of street homelessness: that having arrived in the UK, the asylum seeker will not (unless and until an application for asylum has been successfully processed) be allowed an opportunity to establish a home in this country, either in the sense of an adopted homeland or in the sense of obtaining housing as home. As we have seen, in some cases this goes beyond questions of adequacy of housing and home, to the basic denial of shelter.

In such cases it is helpful to bear in mind that in *Adam, Limbuela and Tesema*,[84] Lord Brown noted that an intention to cause street homelessness could 'readily be characterised' as involving 'degrading treatment' and would be enough to engage the direct responsibility of the state.[85] Thus if the government can be taken to know about the mass destitution of failed asylum seekers, resulting from the poor administration of, and tough eligibility criteria for, section 4 support, then

80 *Saadi v Italy* (2009) 49 EHRR 30 [127]. The question was whether expulsion of a terrorist suspect to a state where he might suffer torture, inhuman or degrading treatment was justifiable. The full quotation is, 'As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct [see *Chahal v UK* (1997) 23 EHRR 413, § 79], the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 [...].'

81 Joint Committee on Human Rights, 'Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers', HL (2006–2007) 134; HC (2006–2007) 790, 14.

82 Joint Committee on Human Rights, 'The Treatment of Asylum Seekers' HL (2006–2007) 81-I; HC (2006–2007) 60-I, 110 (emphasis added).

83 *R. (Kimani) v Lambeth London Borough Council* [2003] EWCA Civ 1150 [24] (Lord Phillips MR).

84 *R. v Secretary of State for the Home Department ex parte Adam, Limbuela and Tesema* [2005] UKHL 66; [2006] 1 AC 396.

85 Ibid. [101] (Lord Brown).

it would seem that the government is directly responsible for the deliberately 'discouraging' conditions resulting from the ensuing denial of housing rights amounting to inhuman and degrading treatment. This opens up the possibility for a significant advance under Article 3 in respect of asylum seekers and failed asylum seekers facing street homelessness, particularly since, following *Chahal*, if the statutory framework gives rise to destitution amounting to inhuman and degrading treatment,[86] it cannot be justified or balanced against other policy aims.

The recent High Court decision in *R. on the Application of N v Coventry City Council*[87] has, unfortunately, confirmed that the courts have not yet adopted this reasoning, but appear to be continuing to pursue a 'minimal compliance' approach to their ECHR obligations in respect of housing asylum seekers. Mr Garnham QC (sitting as a deputy High Court judge) examined whether the Coventry City Council's cessation of section 21(1)(a) NAA 1948 support to an HIV-positive failed asylum seeker suffering from tuberculosis, TB meningitis, syphilis and cognitive disturbance would trigger the human rights safeguard of paragraph 3, Schedule 3 of the NIAA 2002. The judgment found that the cessation of local authority support would not be a breach of the ECHR:

> because it would be open to the claimant to return to his home country of South Africa...If he chooses to stay in the United Kingdom, the degradation he may suffer is a consequence of that decision, not the cessation of Coventry's support.[88]

The Article 3 argument is an important element of the overall approach to questions of shelter, housing and home for asylum seekers. It is a potentially powerful argument since, as the decision in *Chahal* has indicated, as an absolute right it is not subject to qualification, so that the court cannot justify an interference with Article 3 rights based on the balance of the individual's right against other policy aims. On the other hand, the Article 3 right is inherently limited in that it is likely to apply only in the most extreme cases of destitution, where a failed asylum seeker is facing street homelessness. As such, it goes to lack of shelter, rather than questions of the adequacy of housing or the home experience. In addition, as the discussion in this section has demonstrated, to date the UK courts have adopted a minimal compliance approach which undermines the applicability of Article 3 even in cases of extreme destitution.

Nevertheless, and despite having not yet been taken on board by the judiciary, the Article 3 approach outlined here offers the strongest compliance or legal enforcement based argument in this context. The following sections show that while the International Covenant on Economic Social and Cultural Rights

86 By prohibiting work, denying support, and failing to arrange genuinely voluntary departure or facilitate efficient forced removals.

87 [2008] EWHC 2786 (Admin).

88 Ibid. [51].

(ICESCR) sets out a right to housing, and Article 8 of the European Convention on Human Rights contains the right to respect for home, the legal frameworks for the enforcement of these rights are structurally weaker than Article 3 so far as any compliance-based approach is concerned.

(9) The ICESCR Argument: the Right to Housing

The right to housing in international law has its origins in Article 25(1) of the 1948 Universal Declaration of Human Rights. The 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR) is now the most significant international human rights law applicable in this field. Under Article 2(2) ICESCR States Parties agree to guarantee the rights contained within without discrimination on, amongst other grounds, 'national and social origin'. Thus, under this Covenant, states must guarantee the rights of non-nationals such as refugees and asylum seekers. Article 11 of the ICESCR requires that states recognise:

> the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions

This article is included within the rights owed to 'aliens generally' under Article 21 of the 1951 UN Refugee Convention, and has been used to ensure that refugee accommodation is, for example, habitable and not impracticably remote.[89]

The weakness of housing rights for refugees and asylum seekers derived from the ICESCR lies within the nature of the obligation that the Covenant places upon states. The notion of economic, social and cultural rights is controversial in some quarters because they may be understood as insufficiently precise in scope and requiring an unrealistic amount of state expenditure.[90] In the light of this, under Article 2(1) ICESCR each State Party undertakes 'to take steps…to the maximum of its available resources…with a view to achieving progressively the full realisation of the rights recognised…'

The UN Committee on Economic, Social and Cultural Rights has expressed its view of the obligations arising under the Covenant in its 'General Comment No. 3: The Nature of States Parties Obligations'.[91] It has argued that under Article 2(1) ICESCR States Parties are under an immediate duty to take steps to secure the

89 See J.C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge 2005), 826, discussing UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 4', 'The Right to Adequate Housing (Art.11 (1))' (1991) UN Doc HRI/GEN/1/Rev.7.

90 See generally, H. Steiner, P. Alston and J. Goodman, *International Human Rights in Context* (3rd edn Oxford University Press, Oxford 2008), 263 *et seq.*

91 UN Doc E/1991/23.

rights contained in the Covenant,[92] unless they can demonstrate that they do not have the resources to comply with even a 'minimum core obligation'.[93] Moreover, in carrying out any actions relative to the right to housing, states are bound by the overarching principle of non-discrimination.[94]

It has discussed the issue of housing specifically in its 'General Comment No. 4: The Right to Adequate Housing', which has taken a broad interpretation of Article 11 ICESCR so that it encompasses not merely the provision of shelter, but 'the right to live somewhere in security, peace and dignity.'[95] The content of the right to housing, in respect of both practical issues such as location and quality, and in relation to the human need to establish a home, has been extensively scrutinised by Kenna,[96] who has emphasised the inter-relationships between shelter, housing and home.[97]

In addition to its inherent value, it has also been recognised that the 'right to housing' under ICESCR has instrumental value, since it facilitates the protection of other rights. As the discussion in the opening section of this chapter has highlighted, the UN Committee on Economic, Social and Cultural Rights has emphasised the importance of viewing housing within the broader framework of human rights, as 'integrally linked to other human rights',[98] and as indivisible and interdependent with civil and political rights.[99] The potential for adopting a legal strategy which relates the right to housing – with all the barriers to enforcement as a positive obligation that economic, social and cultural rights carry – to civil and political rights – inherently more enforceable as 'absolute rights' – must lie in the argument that housing and home can function as a gateway to civil and political rights.

This proposition can be viewed as echoing Hegel's argument in *Elements of the Philosophy of Right*,[100] where the institution of private property was justified on the basis that it provided a gateway to the property owner's engagement in civil society.[101] In fact, Hegel claimed that the function of private property as a means

92 Ibid. [2].

93 Ibid. [10].

94 Ibid. [1].

95 See S. Breau, 'The International Law Rights to Home and Homeland' in this volume.

96 P. Kenna, 'Globalization and Housing Rights' (2008) 15 *Indiana Journal of Global Legal Studies* 397.

97 See P. Kenna, 'Can International Housing Rights Based on Public International Law Really Impact on Contemporary Housing Systems?' in this volume.

98 See UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 4', 'The Right to Adequate Housing (Art.11 (1))' (1991) UN Doc HRI/GEN/1/Rev.7.

99 See UNGA Res 32/130 (16 December 1977) UN Doc A/Res/32/130.

100 G.W.F. Hegel, *Elements of the Philosophy of Right* A.W. Wood (ed.), H.B. Nisbet (trans.) (Cambridge University Press, Cambridge 1991) 73–102.

101 Hegel argued that in order for human beings to live fully developed, conscious lives, it was necessary that they should be capable of acquiring property.

of establishing personhood took precedence over the function of private property as a means of satisfying a person's material needs, since property was fundamental to the existence of the *person*: thus, Hegel asserted that '[n]ot until he has property does the person exist as Reason.'[102] For Hegel, the essential basis of property for the existence of the *person* was derived from the function of private property as a medium through which individuals could exhibit their will. The approach is also reflected in Radin's theory of 'property for personhood', which posited that 'that to achieve proper self-development – to be a *person* – an individual needs some control over resources in the external environment.'[103] A crucial further step for Hegelian philosophy, however, was the idea that people needed to be made secure in their control over parcels of the material world in order to be capable of developing as persons within the wider material and social world, and so to function within civil society. Thus:

> That all human beings should have their livelihood to meet their needs is, on the one hand, a moral *wish*; and when it is expressed in this indeterminate manner, it is indeed well intentioned, but like everything that is merely well intentioned, it has no objective being. On the other hand, a livelihood is something other than *possession* and belongs to another sphere, that of civil society.[104]

While Hegel was primarily concerned with property *ownership*, the analogy to the opportunity to establish housing as home, so enabling the asylum seeker to acquire some degree of control over their environment in a context in which they have been stripped of autonomy and their identity has been disrupted is not difficult to make.

The possibility of applying Hegel's comments concerning *property ownership* more broadly is recognised by Ryan when he noted that:

> the point of there being property rights is to be seen in a variety of ways in which people anchor themselves and their purposes in the world. There is no suggestion that each and every person can or should have certain sorts of property in order to be at home in the world…No particular property rights seem essential – though rights certainly are.[105]

102 G.W.F. Hegel, *Elements of the Philosophy of Right* A.W. Wood (ed.), H.B. Nisbet (trans.) (Cambridge University Press, Cambridge 1991) 73 (s. 41).

103 See M.J. Radin, 'Property and Personhood' [1982] 34 *Stanford Law Review* 957.

104 G.W.F. Hegel, *Elements of the Philosophy of Right* A.W. Wood (ed.), H.B. Nisbet (trans.) (Cambridge University Press, Cambridge 1991) 80 (s. 49).

105 See G.W.F. Hegel, *Elements of the Philosophy of Right* A.W. Wood (ed.), H.B. Nisbet (trans.) (Cambridge University Press, Cambridge 1991) (s. 33); A. Ryan, *Property and Political Theory* (Blackwell, Oxford 1984), 124.

Thus, in Radin's terminology, 'object-relations' is identified as 'the first step on [the] road from abstract autonomy to full development of the individual in the context of the family and the state.'[106] This development, in turn, can be seen as a necessary precursor to the individual's ability to exercise civil and political rights, so enabling the position of the right to housing as a gateway right to civil and political rights to be delineated. This is also reflected in the proposition that: '[n]ot being able to call any place "home" is implicitly considered to be a handicap for being a complete human being.'[107] The consequence of various legal frameworks which exclude asylum seekers from rights to secure shelter, housing and home, can thus be seen to have consequences beyond housing *per se*, which spill over into exclusion from civil and political life, as 'the refugee is not simply excluded from the law in an indifferent manner but rather abandoned by it.'[108]

(10) Article 8, ECHR: the Right to Respect for Home

The idea of an enforceable 'right to respect for home' is similarly not one which sits easily within English law. Historically, references to respect for home have tended to revolve around the idea of *privacy* at home, and particularly with the extent to which the state can lawfully impinge upon a citizen's private dwelling.[109] While Article 8(1) of the European Convention on Human Rights states that 'Everyone shall have the right to respect for his private and family life, his home and his correspondence', the reference to 'respect for home' in this paragraph is clearly embedded in the overall context of Article 8. For example, in *London Borough of Harrow v Qazi*,[110] the first landmark decision of the House of Lords on the right to respect for home, Lord Hope noted that: '[m]ost international human rights instruments recognise a right to privacy. That is the concept which underlies Article 8 of the Convention.'[111] Thus, the references in Article 8 to the right to respect for family life, for home and for correspondence are often viewed conjunctively, as aspects of the right to private life,[112] and the right to respect for

106 M.J. Radin, 'Property and Personhood' [1982] 34 *Stanford Law Review* 957, 45.

107 H. van der Horst, 'Living in a Reception Centre: the Search for Home in an Institutional Setting' (2004) 21 *Housing, Theory and Society* 36.

108 B. Diken, 'From Refugee Camps to Gated Communities: Biopolitics and the End of the City' (2004) 8 *Citizenship Studies* 89.

109 *Entick v Carrington* (1765)19 St Tr 1030; *Malone v Commissioner of Police for the Metropolis (No 2)* [1979] Ch 344.

110 [2003] UKHL 43.

111 Ibid. [49].

112 Van Dijk and van Hoof have noted that: '[a]s a collection noun designating the rights involved in Article 8, the 'right to privacy' is often used nowadays.'; P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer, The Hague 1998) 489 [8.1].

home in Article 8 has tended to be narrowly interpreted as meaning the right to *privacy* from the state's gaze within one's home.[113]

A first important point of note in relation to Article 8 of the Convention is that it is directed at protecting citizens against interferences with their established home; Article 8 does *not* provide for a *right to a home*. This was clearly established shortly after the Convention was adopted, in the decision of the European Commission on Human Rights in *X v Germany*.[114] The Commission, which ruled on the admissibility of claims brought under the Convention, rejected the argument that Article 8(1) imposed a duty on the state to provide citizens with a home.[115] Indeed, in several subsequent cases, the European Court of Human Rights has repeatedly confirmed that Article 8 does not give the right to be provided with a home, nor does it give a right to have one's housing problem solved by the state.[116] Rather, Article 8 is concerned with protecting citizens against interferences with their *existing* homes. When applying this to the case of asylum seekers, the limitations are clear: for those without existing homes, there is a fundamental difficulty in identifying the node of enforceability. Indeed, the explicit policy of the UK government to prevent asylum seekers from establishing homes might be seen to exclude any application of Article 8.

However, even in such cases where the asylum seeker has secured (temporary) accommodation, the strength of Article 8 in enabling that position to be defended is – so far as enforceable rights are concerned – likely to be weak. Any entitlement which an occupier might have to respect for home under Article 8 is qualified, as even when an interference with an Article 8 right has been established, that interference may be justified under Article 8(2), if it can be shown to be:

> in accordance with law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

113 For example, work to develop more robust criminal and civil responses to domestic violence within the home in England had to overcome the additional challenges associated with policing offences with the private space of the home; see for example S.S.M. Edwards, *Policing 'Domestic' Violence: Women, the Law and the State* (Sage, London 1989).

114 (1956)1 Yearbook 202.

115 The Commission held that the right to an adequate standard of living and the right to suitable accommodation were not in principle among the rights and freedoms safeguarded by the Convention. See, for example, A.H. Robertson (ed.), *Privacy and Human Rights* (Manchester University Press, Manchester 1973) [79].

116 *Chapman v United Kingdom* (2001)33 EHRR 399, 427 [99]; *Marzari v Italy* (1999)28 EHRR CD 175, 179; *O'Rourke v United Kingdom* (26 June 2001, Application No 39022/97).

In a series of recent cases,[117] the House of Lords has sought to set the bar for minimal compliance with Article 8 in relation to UK nationals so that it would not be necessary to consider whether any interference was justified where the occupier had no contractual or proprietary right to remain in occupation;[118] or so that any such interference could be presumed to be justified where Parliament had already struck a balance between the competing interests.[119] More recently, in *Doherty v Birmingham City Council*,[120] the House of Lords allowed for the possibility of some review of the *process* by which a local authority made a decision to evict, although the procedural nature of this review is emphasised by the decision to allow this through a (HRA-informed) judicial review process, rather than a 'proportionality review', such as that expected by the European Court of Human Rights in discussing the right to respect for home in *Connors v UK*,[121] and *McCann v UK*.[122]

Thus, while the decision in *Doherty* has extended the applicability of Article 8 to eviction cases by allowing for a judicial review process which can scrutinise the reasons behind the local authority's decision to evict, the applicability of this article to asylum seekers is limited in two key respects. Firstly, as a qualified right, any assertion of the right to respect for home is subject to balance against competing policy aims which, in the case of failed asylum seekers, have been very clearly articulated in the shape of the policy of return. However, beyond this, it is also significant that as a qualified right, the state is entitled in considering claims under Article 8 to make a distinction between citizens and non-citizens, so that even the weakly enforceable rights available to UK citizens against eviction can be denied to asylum seekers.

(11) Conclusion: Human Rights as Policy Goals, not Legal 'Minima'

The manipulation of (failed) asylum seekers' vulnerable grasp on 'home' connections has led us to explore the quality and location of asylum accommodation, and policies aimed at restricting access to such accommodation and support as they have been mediated through the lens of legal interpretation. However, the existing legal tools for giving effect to home interests are crude, and often ineffective, and it is therefore a bare, atrophied vision of home that is glimpsed through them. The

117 *London Borough of Harrow v Qazi* [2003] UKHL 43; *London Borough of Lambeth v Kay; Leeds City Council v Price* (*Kay & Price*) [2006] UKHL 10; and *Doherty v Birmingham City Council* [2008] UKHL 57.

118 *London Borough of Harrow v Qazi* [2003] UKHL 43.

119 *London Borough of Lambeth v Kay; Leeds City Council v Price* (*Kay & Price*) [2006] UKHL 10.

120 *Doherty v Birmingham City Council* [2008] UKHL 57.

121 Application No 66746; judgment, 27 May 2004.

122 Application No 19909/04; judgment, 13 May 2008.

right to housing is inherently weak as a socio-economic right, and the English courts have applied a restrictive interpretation to the (qualified) right to respect for home in Article 8 ECHR. Even the protection afforded by Article 3 ECHR in the *Limbuela* case hinged upon applicants being able to show that they their situation exposed them to an 'imminent prospect' of inhuman and degrading conditions,[123] which is a desperate and fearful state and, thus, assistance at this stage comes too late and too infrequently to constitute a reliable legal recourse. Yet, despite the apparent weakness of arguments that rely on the enforcement of strict legal rights under human rights law to secure housing and home for asylum seekers, we would argue that the notion of home as a core element of being human, and thus of human rights, can still help us to rework our understanding of (failed) asylum seekers' destitution, and to support legislative interventions that are not dependent on the generosity of sympathetic and activist judges to mitigate its worst effects.

There is some evidence that an approach to asylum seekers that recognises the importance of home is realistic. For example the obsession with failed or late applying asylum seekers' 'choice' to be homeless is not mirrored within domestic housing policy. Part 7 of the Housing Act 1996 recognises a category of person who is 'intentionally homeless' but is also 'in priority need', and who must be provided temporary accommodation for such a period as would given them a reasonable opportunity to find accommodation for themselves. For this category of person, it would seem that at a policy level (i.e. rather than by compulsion from Article 3 ECHR) it has been deemed appropriate that local authorities must provide support, notwithstanding the 'choice' of the applicant.

A second set of examples that demonstrate how respect for 'home' might influence the legislative process can be seen in recent debates about the treatment of failed asylum seekers. During the parliamentary debates on the UK Borders Act 2007, to which reference was made briefly above, an alliance of refugee organisations lobbied in favour of an amendment which would have allowed failed asylum seekers access to support and accommodation until they left the UK or were removed. The amendment was opposed by both the government and the opposition, and it was rejected.[124] A striking feature of the debates was that the issue of human rights, let alone the importance of 'home' to being human, was largely absent from the discussions.[125]

Similar legislative suggestions have, however, been put forward in relation to the proposals of the European Commission for reforms to the Common European Asylum System, and in relation to which the connection to human rights has

123 *R. v Secretary of State for the Home Department ex parte Adam, Limbuela and Tesema* [2005] UKHL 66; [2006] 1 AC 396.

124 The passage of the Act, and the arguments about this amendment are covered in more detail in J.A. Sweeney, 'The Human Rights of Failed Asylum Seekers in the UK' (2008) *PL* 277 and C. Lewis 'Asylum Support Brief – Part Three: Failed Asylum Seekers' (2006) 156 *NLJ* 1246, 277 *et seq*.

125 Ibid., 280.

been more explicit (although, as we shall see, the UK Home Office remains rather sceptical). The European Union is in the process of reforming its Common European Asylum System. In European parlance, issues such the housing rights of asylum seekers would be termed as involving their 'material reception conditions'. One of the key legislative proposals is to recast the current Reception Directive,[126] the legal instrument that specifies minimum levels of treatment for people claiming asylum in the EU.

The thinking of the UK Home Office under the outgoing Labour government was indicated in the form of an Explanatory Memorandum dated 23 December 2008, and signed by Phil Woolas, then Minister of State for Borders and Immigration.[127] The general theme of the memorandum is that many of the proposals reflect existing practice in the UK, and are therefore not necessary. This applies, for example, to the proposal to unify the procedure for considering 'pure' asylum claims and claims for subsidiary protection (e.g. fears of more general human rights abuses falling short of the refugee definition) in a single process, which the UK already does.[128] It also applies to proposals to enhance protection for detained people[129] and people with special needs,[130] and to improve standards of living for asylum seekers.[131] The Home Office has, however, expressed concern over the proposal to allow asylum seekers to gain access to the labour market after they have been in the UK for six months.[132]

The approach to human rights is, however, rather telling. In an early section of memorandum headed 'legal and procedural issues' the memorandum presents an assessment of the compatibility of the European Commission proposals with human rights norms, and concludes that the proposals respect fundamental rights.[133] En route to this conclusion the memorandum notes that the European Commission proposals state that to ensure higher and more equal standards of reception will have 'an overall strong positive impact from a fundamental rights point of view'.[134] The memorandum, however, continues by stating that, '[W]e [the Home Office] believe that these proposals would grant entitlements that go substantially beyond *the minima guaranteed by those rights*'.[135]

126 Council Directive (EC) 2003/9 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18; the reform proposals are set out in Commission (EC), 'Proposal for a Directive of the European Parliament and of Council Laying Down Minimum Standards for the Reception of Asylum Seekers' COM (2008) 815 final, 3 December 2008.

127 Explanatory Memorandum on file with the authors.

128 Ibid. [14].

129 Ibid. [15–17].

130 Ibid. [23–27].

131 Ibid. [21–22].

132 Ibid. [18–20].

133 Ibid. [8].

134 Ibid.

135 Ibid., emphasis added.

When this general approach is coupled with the previously noted concerns about improving the standard of living for asylum seekers and their access to the labour market, it would seem to have led to the avoidance of human rights thinking as a mobilising force for responding to double displacement on the part of the Home Office. The treatment of human rights in the memorandum implies, as the heading also suggests, that human rights law constitutes a legal and procedural hurdle to be overcome, rather than human rights norms acting as a goal or aspiration to be progressively realised. Yet this is not the only way to view the role of human rights thinking in the legislative process. Indeed the Committee of the Regions of the European Union issued its own formal Opinion on Commission Proposals, which adopted a human rights oriented approach and went further in its attempts to avoid double displacement, with proposals on failed asylum seekers that can be described as particularly humane.

The Committee of the Regions was established in 1994, following the Maastricht Treaty of 1992, to give a voice to sub-national bodies in the European legislative process. It is by no means equal in its influence to the core 'institutional triangle' of the European Commission, Council and Parliament, but its views are sought on topics that concern its membership. It is presently comprised of 344 members, who are all local politicians across the 27 member states of the EU.[136] Since local authorities are closely involved in the reception of asylum seekers and the integration of refugees, the Opinion of the Committee of Regions is particularly significant in this context.

At its 81st Plenary Session on 7 October 2009, the Committee of the Regions voted to adopt its Opinion on the CEAS reforms.[137] In it, the Committee broadly welcomed the Commission's proposals, including those relating to access to the labour market,[138] but then, taking inspiration from Article 3 ECHR,[139] proposed an amendment to the recast Reception Directive that would greatly enhance the situation of failed asylum seekers. The proposal merits quotation in full:

> Article 20(6). Member States shall not withdraw or reduce material reception conditions from refused applicants for international protection until plans for their removal or voluntary return are in place.
>
> Article 20(7). Forced destitution, or the threat of it, shall never be used in order to coerce refused applicants to return to their state of origin.
>
> Article 20(8). Refusal of primary healthcare, or the threat of such, shall never be used in order to coerce refused applicants to return to their state of origin.

136 See www.coe.europa.eu, accessed 6 January 2010.

137 Committee of the Regions (EU), 'Opinion of the Committee of the Regions on The Future of the Common European Asylum System II' (Opinion) CdR (09) 90 final, 5–7 October 2009. James A. Sweeney acted as expert advisor to the Committee of the Regions during this process.

138 The Committee noted that access after six months is a controversial proposal for some member states, but that it could benefit both the asylum seeker and the member state: ibid. [18].

139 The rationale is explained in the text accompanying the proposed amendment.

These clear statements (which still acknowledge that failed asylum seekers must nevertheless depart the state in which they claimed asylum) would, if they were incorporated in the Directive, do much to ameliorate the situation of the *people* who are labelled 'failed asylum seekers'. It would also recognise that these people, whether they have a legal right to remain in the host state or not, still possess human rights.

Most importantly, and as argued in the first part of this paper, these proposals recognise that protection of 'home' is not a second order human right, deserving of protection only when its denial amounts to inhuman and degrading treatment within Article 3 ECHR, but it is, rather, a crucial element of the distinctively human experience. While there is little indication at present that this type of argument is likely to be recognised by the UK courts as giving rise to any enforceable right on the part of the asylum seeker, it is appropriate to remember that the 'minimal compliance' approach (which we have also recognised in relation to Article 3) is not the only route to realising human rights norms within UK law. As a matter of international human rights law, and in conformance with the principle of subsidiarity underpinning the ECHR, it is permissible for the UK to go further than the strict requirements of the ECHR, one element of which is reflected in Article 53 where it is stated that: 'Nothing in [the] Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.' The logical corollary of this provision is that a Contracting Party is free to choose a non-minimalist approach to the protection of human rights,[140] rooted not in the relatively weak enforceability of the right to housing, but in a wish to develop good practice based on human rights norms.

To suggest that such development should be curtailed because it goes beyond the international minima is to fundamentally misunderstand the relationship between human rights norms at large and the provisions of international human rights treaties. Morality, including human rights norms, begins with richness and complexity, rooted in particular societies. It is only in times of stress that complex moral positions need to be reduced to universally identifiable statements such as 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Such universal principles are human rights norms at their most intense, but they derive from, rather than lead to, human rights norms expressed

140 Herbert Petzold noted this with respect to the pre-Protocol 11 Convention: 'The Convention and the Principle of Subsidiarity' in R. St J. Macdonald, F. Matscher, and H. Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhof, Dordrecht 1993), 49–59.

by particular societies.[141] Thus, the idea of the right to housing as home, which has been seen to resonate strongly with experiential evidence relating to asylum seekers, can be seen to have considerable critical potential. Human rights norms can help inculcate political willingness to act responsibly in contentious areas such as the relationship between immigration and social housing.

To achieve this potential, however, the discourse on 'home' must shift from a focus on the judicial enforceability of existing human rights norms via the circuitous routes detailed above, to the applicability of human rights norms in the formulation of legislative solutions to the needs of asylum seekers, who are at risk of double displacement. Human rights, including home rights, should not be seen as legal minima, but rather as policy goals that legislation should seek to achieve.

141 On this point see J.A. Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54 *ICLQ* 459, 470, discussing M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, Notre Dame 1994).

Chapter 6

Can International Housing Rights Based on Public International Law Really Impact on Contemporary Housing Systems?

Padraic Kenna

(1) Introduction

The concept of home advances a new basis for evaluating housing rights, emphasising their human and personal benefits. Housing rights address, at a national, regional and global level, displacement and dispossession, as well as access to home for all. These rights are forging a new discourse and jurisprudence across the world, largely based on public international law instruments. However, the legal liberalist approach and framework of such housing rights discourse needs to engage with housing systems at the *macro*, *meso* and *micro* levels. There is a particular and urgent challenge in addressing the structural and institutional elements of housing systems, such as housing finance, infrastructure, ownership and exchange of housing and regulation of housing systems and sub-systems. Ultimately, this could ensure that the contemporary revival of global housing finance regulation can incorporate a housing rights perspective.

(2) The Concept of Home

The concept of home is widely viewed as central to housing and housing rights – a critical element of the basic physiological needs of food, clothing and shelter, established by Maslow, and in contemporary societies often relating to the safety, love/belonging, esteem and self-actualisation needs.[1] Housing and home are connected to health, child development, poverty and opportunity in general. The emotional and symbolic significance of housing and home relate to the sense

1 See A.H. Maslow, 'Theory of Human Motivation'. Originally published in *Psychological Review* (1943) 50 370–96. See also A.B. Trigg, 'Deriving the Engel Curve: Pierre Bourdieu and the Social Critique of Maslow's Hierarchy of Needs' (2004) 62 (3) *Review of Social Economy* 393, 406.